No. 94269-2

SUPREME COURT
OF THE STATE OF WASHINGTON

EL CENTRO DE LA RAZA, a Washington non-profit corporation; LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; INTERNATIONAL UNION OF OPERATING ENGINEERS 609; AEROSPACE MACHINISTS UNION, IAM&AW DL 751; WASHINGTON STATE LABOR COUNCIL, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS UNION 21; WASHINGTON FEDERATION OF STATE EMPLOYEES; AMERICAN FEDERATION OF TEACHERS WASHINGTON; TEAMSTERS JOINT COUNCIL NO. 28; WAYNE AU, PH.D., on his own behalf and on behalf of his minor child; PAT BRAMAN, on her own behalf; and DONNA BOYER, on her own behalf and on behalf of her minor children,

Appellants,

vs.

STATE OF WASHINGTON,

Respondent.

BRIEF OF AMICI CURIAE LEGISLATORS

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A. INTRODUCTION

The amici legislators are concerned that the plaintiff/appellants (hereinafter "charter school opponents") offer this Court an erroneous understanding of the Legislature's use of funds and accounts in the Treasury like the General Fund, as well as traditional legislative budget practices. The amici legislators provide this brief to dispel the charter school opponents' misperceptions about legislative fiscal practices that improperly color their legal arguments. This Court should have an accurate sense of how Washington's complex budgetary process works in rendering its decision, as well as the Legislature's fiscal responsibilities under article II, § 1 and article VIII, § 4.

The amici legislators also offer this brief to uphold the broad responsibility of the Legislature under article IX, § 2 of our Constitution to "provide for a general and uniform system of public schools." The Legislature has the central constitutional authority to organize and fund Washington's public school system, and this Court should uphold that authority in connection with charter public schools.

B. IDENTITY AND INTEREST OF AMICI CURIAE

As explained in their motion for leave to submit this amicus memorandum, the amici legislators are bicameral and bipartisan elected and former members of the Washington State Legislature concerned about

the education of Washington's children. They have focused this brief on two topics that are critical to legislators – the proper interpretation of legislative authority under our Constitution to make budgetary decisions and the constitutional authority of the Legislature to define and organize Washington's public school system in Washington.

C. STATEMENT OF THE CASE

The amici legislators acknowledge the parties' statements of the case in their briefs before this Court. They incorporate by reference the statements of the case in the State's brief at 2-15, and the Intervenors' brief at 3-14. However, the amici legislators take explicit issue with certain significant factual errors about the legislative budgetary process and the Legislature's constitutional authority over the public school system in the charter school opponents' opening and reply briefs. Those errors will be addressed in the argument section herein.

D. SUMMARY OF ARGUMENT

The Legislature's authority to create funds and accounts as part of the State Treasury, and appropriate from them for public purposes, is but one facet of the Legislature's extensive budgetary authority under article II, § 1 and article VIII, § 4 of the Washington Constitution. That plenary authority is limited only by restrictions in the Constitution itself. The trial

court's ruling here preserved the Legislature's budgetary authority, subject to the provisions of article IX, § 3 as to the common school fund.

Article IX, § 3 directs the Legislature to create a common school fund and prescribes the revenues that must be placed there mandatorily. The General Fund is not synonymous with the common school fund, and neither is synonymous with the opportunities pathway account ("OPA"). The Legislature is free under its broad budgetary power to create non-General Fund, non-common school funds or accounts in the Treasury, as it did with the OPA.

Moreover, the Legislature is free to support public charter schools from the OPA, or other non-General Fund accounts as it may choose, as part of its constitutional budgetary authority.[1] It has not "diverted" any money from the common school fund, or even the General Fund, to support public charter schools.

The trial court's ruling here properly reflected that the Legislature has the authority to define the public school system in Washington under article IX, § 2 so long as that system is "general and uniform," meaning that it is open to all students and credits earned by students in such a program are freely transferrable. The common schools are a subset of that

[1] In theory, the Legislature could also fund charter public schools from the General Fund, so long as it distinguished the revenues that must mandatorily be placed in "the common school fund" under article IX, § 3 from other General Fund revenues. That issue is not presently before the Court.

overall public school system and the Legislature is free to create other public educational programs as part of the public school system. Public charter schools are such a public educational program within the article IX, § 2 authority of the Legislature to create.

E. ARGUMENT

In 2016, following the Supreme Court's decision on charter public schools in *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 355 P.2d 1131 (2015) ("*LWV*"), the Legislature enacted Second Substitute Senate Bill 6194 into law. Ch. 241, Laws of 2016. In that legislation, the Legislature made clear that charter public schools are not common schools, but are public schools operated separately from the common school system. RCW 28A.710.020(1)(b). Such schools are funded by legislative appropriations from the OPA. RCW 28A.710.270. That account was created in the State Treasury by RCW 28B.76.526, as a non-General Fund account, and supports a number of educational programs; the account is funded by lottery proceeds. RCW 67.70.240.

The central thesis of the charter school opponents on the funding of charter public schools under article IX, §§ 2, 3 is that the appropriation of funds for public charter schools from the OPA, a non-General Fund account somehow "side steps" this Court's ruling in *LWV*, "diverting" funds from the common schools. CP 225, 229-30.

The trial court cogently dispensed with that argument and appropriately concluded that no "diversion" to public charter schools of funds dedicated to common school took place. CP 3762-64. The court noted that the OPA was distinct from the General Fund, and that any argument that the Legislature *might* in the future invade common school-dedicated revenues to support public charter schools was so speculative as to be unripe for consideration. *Id*. The trial court was correct.

On appeal, however, the charter school opponents again contend that the Legislature has "diverted" constitutionally restricted funds that should be devoted to the common schools to charter public schools. Br. of Appellants at 30-36. The argument put forth by the charter school opponents would collapse all state accounts receiving revenue into the General Fund as they effectively equate the General Fund with the constitutional common school fund. The two funds are distinct. But more to the point, the OPA is distinct from the common school fund and the General Fund.

Simply put, the Legislature is obligated to support common schools from the "common school fund." But it may also create non-General Fund funds or accounts and support public education programs from them. It has routinely done this in the past. Under the Legislature's constitutional budgetary power, this is no more a "diversion" of support

for common schools than is a legislative decision to support other, non-educational programs from the General Fund, or to support other programs, including educational programs, from non-General Fund sources.[2]

(1) The Legislature Has Broad Constitutional Power Over the Creation and Appropriation from Various Funds and Accounts in the Treasury

With regard to the legislative budget process, the State does not have but one budget and that budget is not funded only from the General Fund. Although plaintiffs assert that if the Legislature creates a separate account and appropriates money from it to support charter public schools, such an action has "detracted" from the Legislature's obligation to fund common schools from the common school fund as required by article IX, § 2 of the Constitution, that analysis is erroneous.[3]

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[2] That the charter school opponents do not like charter public schools is manifest, but a majority of their fellow citizens, and the Legislature, disagreed. The Legislature's decision in 2016 on how to fund charter public schools from a non-General Fund account did not "divert" funds in any fashion from the entirely separate common school fund. Such a decision was within the Legislature's plenary constitutional budgetary authority and consistent with legislative budget practice.

[3] The charter school opponents' mistaken understanding about the Legislature's budget process may flow from this Court's discussion of a "state tax for common schools." The *LWV* court stated: "All money allocated to the support of the common schools … constitutes a 'state tax for the common schools' in contemplation of art. IX, sec. 2, of the constitution … Once appropriated to the support of the common schools, funds cannot subsequently be diverted to other purposes." *LWV*, 184 Wn.2d at 407-08. But the Legislature has never designated a "state tax for the common schools," as such, and it is important to understand the revenue source and object of expenditure in light of article IX, § 3.

The Legislature actually enacts three biennial budgets, not one. As noted in the seminal book on the legislative process, Edward D. Seeberger, *A Guide to the Washington State Legislative Process* (UW Press 1997) at 75-93,[4] the Legislature adopts an operating budget, a capital budget, and a transportation operating/capital budget. Each is supported from a variety of revenue sources including state taxes, federal funds, and fees, and those revenues are then placed in a variety of funds and accounts. State budgetary practice is contrary to the charter school opponents' conception that there is but a single budget or that there is a single fund in the State Treasury to fund it.

The *LWV* court cited *State ex rel. State Board for Vocational Educ. v. Yelle*, 199 Wash. 312, 316, 91 P.2d 573 (1939) as support for this analysis, but the facts in that case were peculiar. The 1939 Legislature appropriated money "from the current school fund" for a state match to obtain federal vocational rehabilitation funds. The auditor refused to disburse the funds because he believed they were a diversion of money from the common school fund. The state board for vocational education agreed the vocational education expenses incurred were not for common school purposes. *Id.* at 314. But the board argued that the "current school fund" was not the common school fund of article IX, § 3. In examining the appropriations at issue, this Court concluded that the Legislature had, in effect, appropriated the moneys at issue to the common school fund where the appropriation at issue constituted the *entire* legislative appropriation for common schools for the 1939-41 biennium in satisfaction of the State's article IX, § 1 duty. *Id*. at 316. Budgetary practices from 1939 are no longer in place; the "current school fund" is "extinct." 184 Wn.2d at 421 (Fairhurst, J. dissenting).

Nothing in that case suggests that the Legislature was prohibited from creating funds apart from the General Fund or funds distinct from the common school fund to support educational programs that are not related to the common schools. After *Yelle*, the Legislature appropriated money from the General Fund (and not the "current school fund") for vocational education. *Id*.

[4] Although written in 1997, Seeberger's description of the process is still accurate. Seeberger was a former legislator and Senate staff director.

Critical to this Court's understanding of the State budgetary process and the revenues supporting it generally, and the common school fund specifically, is the fact that our Constitution does not mandate that there be a single fund, supported by a single revenue source, from which the Legislature appropriates money for public purposes, including public schools. While all moneys levied or collected for state purposes must be deposited in the State Treasury, art. VII, § 6,[5] it is wrong to assert that there is only a single fund in the State Treasury.

Our Constitution mandates that there must be certain funds maintained in the Treasury for specific budgetary purposes. In actual budget practice, although the General Fund is the largest, there are other Treasury funds. The common school fund is one. These funds receive revenue from various sources including state taxes, fees, and federal funds. Moreover, the creation of separate funds in the State Treasury to receive particular state revenues is not only permissible, it is constitutionally mandated. For example, the transportation budget is largely funded by fuel tax revenues that article II, § 40 dictates must be *mandatorily* placed in the highway fund. School construction in the capital budget is funded from the common school construction fund.

[5] As is documented in the Office of Financial Management's *Guide to the Washington State Budget Process*, those moneys are derived from a variety of revenue sources, and expended for a variety of purposes as well. CP 567-77.

Wash. Const. art. IX, § 3. Common schools are funded from the common school fund. The Constitution creates that fund in article IX, § 3, and defines its *specific revenue sources*. *See* Appendix.[6] Plainly, the common school fund is not synonymous with the State Treasury, or even the General Fund; it does not receive *all* state revenue. It is more limited in scope than the General Fund.[7] However, article IX, § 2 makes clear that once revenues are placed in the common school fund those revenues may *only* be used for common school purposes ("the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools").

In addition to the constitutionally-prescribed Treasury funds noted above, the Legislature has broad constitutional authority over those funds under article II, § 1 (vesting the legislative power) and is empowered by article VIII, § 4 to establish funds and appropriate moneys from them. *See* Appendix. The Legislature has exclusive power to decide how, when, and

[6] The charter school opponents nowhere point out this constitutional discussion of the common school fund's actual revenue sources.

[7] The Legislature made a choice, for example, to dedicate the State portion of property tax levy revenues to the common school fund. RCW 84.52.067 ("All property taxes levied by the state for the support of common schools shall be paid into the general fund of the state treasury…"). As the *LWV* dissent noted, in 2015, the State budgeted $7.1 billion from the General Fund to public education; only about $2 billion (or 28% of that overall public education budget) was from the common school fund. 184 Wn.2d at 416, 420 (Fairhurst, J. dissenting). The common school fund in 2015-17 represented only a *small fraction* of the more than $18 billion appropriated by the Legislature to support K-12 education. This state portion of the property tax levy is about as close as there is to a "state tax for common schools."

for what purpose public moneys should be used by agencies for state business. *State ex rel. Decker v. Yelle*, 191 Wash. 397, 400, 71 P.2d 379 (1937).[8]

Under this authority, the Legislature has created various funds in the Treasury, and the Legislature has also created numerous accounts within those funds, including the General Fund, to address specific purposes. CP 579-643.[9] The Legislature appropriated from nearly 600 funds or accounts in budgets over the last decade. *Id.* Thus, the establishment of funds or accounts and appropriating from them is hardly an "accounting trick," as the charter school opponents assert, br. of appellants at 2, but rather represents routine legislative budget practice that this Court should not disrupt.

This Court has afforded the Legislature considerable discretion in determining from what fund it may choose to appropriate to meet its constitutional duty to fund education. *See School Districts' Alliance for*

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[8] *See also, State ex rel. State Employees' Retirement Bd. v. Yelle*, 31 Wn.2d 87, 105, 201 P.2d 172 (1948) ("It is accepted doctrine in this jurisdiction that the state, in the exercise of its police powers, can provide by legislative act that all funds coming into the hands of the state treasurer shall become and be *state funds*, but, on the other hand, the Legislature may, in its discretion, also provide for the collection and administration of certain funds without making them *state or public* funds." (Court's emphasis)).

[9] The Legislature has authority to transfer moneys between funds and accounts as an aspect of its broad constitutional legislative and budgetary authority under the Constitution. *Wall v. State ex rel. Wash. State Legislature*, 189 Wn. App. 1046, 2015 WL 5090741 (2015), *review denied*, 185 Wn.2d 1015 (2016).

Adequate Funding of Special Education, 170 Wn.2d 599, 244 P.3d 1 (2010) (upholding legislative decision to fund special education from Basic Education allotments to local school districts). The Legislature may even provide funds from non-General Fund sources to support school programs. In *Newman v. Schlarb*, 184 Wash. 147, 50 P.2d 36 (1956), for example, this Court held that the Legislature could require local governments[10] like Pierce County to impose property taxes to pay for common schools, in satisfaction of its article IX, § 1 duty to fund such schools, stating:

> The state, being engaged in the exercise of a paramount duty, could, of course, select any method it saw fit in order to discharge that duty.

Id. at 153.

With regard to common school funds, as noted *supra*, however, revenues received for the common school funds may not be diverted from that fund to any other purpose than supporting common schools, even if

[10] Local governments often take a role in the public school program funding. Indeed, Seattle has for several years enacted local city levies in support of schools. Nothing *in the Constitution* requires local districts to supervise the administration of public schools; the Legislature could provide for alternative forms of organization for local schools. For example, it might decide to allow a city council, for example, to run schools within a city. The Legislature has already allowed programs like Running Start, College in the High School, Tech Prep, and online programs, to name a few, to be run by organizations other than local school districts.

the purpose is an educational one.[11] But nothing in these cases suggests or requires that *all revenues* the State receives must be placed in the common school fund or that the Legislature cannot appropriate money for other educational programs from funds or accounts separate from the common school fund. Similarly, nothing in *LWV* required such a practice.[12]

There is no actual "state tax for common schools," as noted *supra*. Article IX, § 2 creates a common school fund, supported from identified revenue sources. Those identified funding sources mandatorily are part of the common school fund. But article IX, § 2 explicitly gave the Legislature discretion to add other moneys to that fund. Once the Legislature appropriates money to that fund from other sources, the revenues so appropriated become part of the common school fund and may not be diverted from the purpose of funding common schools. However, the Legislature's decision to appropriate additional money to the common school fund from other funds than the common school fund itself

[11] *Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 228 (1897) (payment of interest on school district bonds); *State ex rel. State Bd. of Vocational Educ. v. Yelle*, 199 Wash. 312, 91 P.2d 573 (1939) (support of vocational rehabilitation); *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 135 P.2d 79 (1943) (support of transportation of parochial school students); *Leonard v. City of Spokane*, 127 Wn.2d 194, 897 P.2d 358 (1995) (vocational education); *LWV*, 184 Wn.2d at 405 (diverting common school funds to non-common school program).

[12] While the Court's majority in *LWV* expressed a concern about the Legislature's past practice of not differentiating between the General Fund and the constitutional common school fund, 184 Wn.2d at 409, that concern was remedied in the 2016 legislation by the appropriation of funds from OPA, an account that has *nothing* to do either with the General Fund or the common school fund.

(with its constitutionally-prescribed funding sources) is not a *permanent* decision, but a decision for each Legislature in its budgetary process to make.[13]

To a considerable extent, because budgets are *lex scripta* having a duration of only two years, the arguments about what the Legislature *might* do in future budgets, raised by the charter school opponents, br. of appellants at 32-34 and reply brief at 3-5, 18-21, is entirely speculative. State br. at 34-40; Intervenors' br. at 27-37.[14] On budgetary matters, as with all policy decisions, no legislative decision may intrude upon the discretion of future Legislatures. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007) ("Implicit in the plenary power of each legislature is the principle that one legislature

[13] As is noted in Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 469 (2003-04), such a budgetary decision, like all budgetary decisions is good for only *two years* at most; budgets are *lex scripta*, not substantive law. *See Wash. State Legislature v. State*, 139 Wn.2d 129, 145, 965 P.2d 353 (1999); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 551, 342 P.2d 588 (1959). To hold otherwise would "constitutionalize" all appropriations for public education in Washington when such a result was never the Framers' intention. Indeed, such a notion is entirely contrary to legislative budgetary practice for more than a century.

[14] The trial court properly determined that such a speculative argument was unripe for resolution. CP 3762-63. That the charter school opponents' argument on this point is unripe is only further reinforced by the operating budget bill for 2017-19, belatedly adopted by the Legislature in June. Laws of 2017, 3d Spec. Sess., ch. 1. In that bill, the Legislature increased the budget over the previous biennium by $5.2 billion. It increased K-12 funding mandated by this Court's *McCleary* decision by $7.3 billion over the next 4 years. In contrast with the tens of billions spent on K-12 funding in the 2017-19 biennium, the Legislature appropriated $62.7 million for public charter schools from the OPA. *Id*.

cannot enact a statute which prevents a future legislature from exercising its law-making power."). Simply put, on budgetary issues, no Legislature may tie the hands of future Legislatures. Those future Legislatures have discretion to appropriate from a variety of sources to avoid any purely theoretical constitutional problem the charter school opponents now identify. The trial court properly concluded their claim was speculative and not ripe for adjudication.

Equally absurd is the charter school opponents' argument that funding public charter schools from the OPA is a "funding swap" with the General Fund. Reply br. at 22-24. Rather, legislators make choices of funds and accounts from which to appropriate. This is but a facet of the Legislature's constitutional budgetary authority. At bottom, the Legislature did not support public charter schools from funds earmarked by article IX, § 3 for common schools.

Thus, with regard to the General Fund, other funds in the State Treasury, and the common school fund of article IX, § 2, the critical points for this Court are:

- the State Treasury or General Fund are not the equivalent of the common school fund; rather, constitutionally and legislatively, the Legislature has historically created distinct funds and accounts in the Treasury from which it appropriates money pursuant to its constitutional authority; and

- the common school fund and the OPA are *distinct*, so that an appropriation from the latter does not "divert" a cent from the former.

This Court should uphold the Legislature's budgetary authority to create funds and accounts in the Treasury and to appropriate funds for public charter schools from the OPA, just such an account that is unrelated to the General Fund or the common school fund of article IX, § 3.[15]

(2) The Legislature Has Extensive Constitutional Authority to Define and Organize Washington's Public Schools

The charter school opponents also contend in their complaint that the Legislature may not create educational programs outside the common school system to provide educational services. CP 230-32.[16] The trial court properly rejected this assertion in concluding that public charter schools do not offend the requirement in article IX, § 2 that the Legislature must create a public school system that is "general and uniform." CP 3754-62.

[15] The charter school opponents' concept that all moneys in the General Fund, or the State Treasury generally, are effectively the "common school fund," if taken to its most absurd extreme would mean that *any* appropriation from the General Fund to a program other than the common schools, such as funding of the State's mental health system, environmental efforts, or any one of a myriad of important public programs, would be an unconstitutional "diversion," as the State noted in its brief at 38-39. That position is untenable.

[16] In fact, they seem to argue that the Legislature is constitutionally mandated to deliver educational services only through school districts. CP 229.

On appeal, although they are not precise in their argument,[17] the charter school opponents seemingly argue for a rigid, "one size fits all" conception of Washington's public schools that has never been the policy of the Legislature or mandated by this Court. Br. of Appellants at 25 (arguing for a system "with unity of governance and educational offerings."); reply br. at 13-17. They claim various educational programs chosen by the Legislature to meet students' needs, often validated by court decision, are different than public charter schools. Reply br. at 6-13. They are not. Moreover, the charter school opponents blithely glide over the parallels between those programs and public charter schools.[18]

The argument by the charter schools opponents represents fundamental diminution of the Legislature's constitutional authority over the structuring of Washington's public school system that the legislator amici reject. For this Court to adopt such an argument would distort the Framers' allocation of responsibility for the public schools in article IX

[17] At one point, the charter school opponents assert that any non-common school public school programs cannot be "stand-alone," programs, br. of appellants at 23-24. In their discussion of "general and uniform," *id.* at 26-30, they seem to contend that the system must be identical in all details down to the school building level. That has *never* been the Legislature's approach to Washington's public school system. It is belied by the myriad of public school programs the Legislature has created, both specialized and stand alone, different in administration, that are necessary, in the Legislature's judgment, to meet particular needs of Washington kids.

[18] For example, to assert that Running Start, online, or Alternative Learning Experience programs are not a wholesale replacement of common schools, reply br. at 12-13, betrays a fundamental lack of understanding about those programs. Students in those programs often never set foot in a traditional K-12 school.

and would jeopardize important effective public educational programs the Legislature has created. The legislator amici ask this Court to reject the charter school opponents' argument.

The charter school opponents largely ignore the broad constitutional authority of the Legislature under article IX, § 2 to organize Washington's educational system. By the specific language of article IX, § 2 of the Washington Constitution,[19] the Legislature has extensive authority to define and organize Washington's public school system so long as the Legislature provides a "general and uniform" system.

This Court has long recognized the Legislature's constitutional role. In *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 518-19, 585 P.2d 71 (1978), this Court delineated the respective roles of the courts and the Legislature in addressing Washington's public school system:[20]

> Although the mandatory duties of Const. art. 9, s 1 are imposed upon the State, the organization,

[19] Article IX, § 2 states:

> *The legislature* shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.

(emphasis added).

[20] This delineation of constitutional duties was further reinforced by the Court in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), albeit in the article IX, § 1 context, where it carefully noted that the courts give broad guidelines as to the applicable constitutional terms, but afford the Legislature the greatest possible latitude to give substantive content to the funding of education. *Id*. at 516-18. This is no less true in the establishment of a "general and uniform" public school system under article IX, § 2.

> administration, and operational details of the "general and uniform system" required by Const. art. 9, s 2 are the province of the Legislature. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done so constitutionally. Within these parameters, then, the system devised is within the domain of the Legislature.
>
> While the judiciary has the duty to construe and interpret the word "education" by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that "education" within the broad guidelines. However, the broad guidelines which we have provided do not contemplate that the State must furnish "total education" in the sense of All knowledge or the offering of All programs, subjects, or service which are attractive but only tangentially related to the central thrust of our guidelines. Specifically, then, we shall refer to the Legislature's obligation as one to provide "basic education" through a basic program of education as distinguished from total "education" or all other "educational" programs, subjects, or services which might be offered.

In interpreting the constitutional directive in article IX, § 2, it is important to note the express language at issue. The Framers understood "common schools" to be a subset of the public school system in Washington when addressing article IX, § 2 ("The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established").[21] High schools were

[21] Courts must look to the plain language of the Constitution, in rendering a reasonable interpretation of that language, giving the textual words their common and ordinary meaning as understood when they were drafted in 1889; courts may also look to the historical context for the words in the Constitution. *Wash. Water Jet Workers Ass'n v.*

not common schools, but were added to the public school system by the Legislature.[22] Thus, the Legislature was to have, and has had, a primal role in the evolution of Washington's public school system under article IX, § 2.

Indeed, as recounted in the State's brief at 33-34, and the Intervenors' brief at 19-20, the Legislature has frequently enacted educational programs for the public school system in Washington that provide a part of a student's overall education or that are administered by the entities other than local school districts. That is consistent with the Legislature's constitutional direction. For this Court to hold otherwise, would eliminate those programs of proven efficacy for Washington kids.

This Court did not specifically address public charter schools and the "general and uniform" mandate in *LWV*, as the Court focused there on the issue of whether public charter schools are common schools. After *LWV*, they are not, but they can still be a part of Washington's public

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Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004); *League of Education Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013).

[22] This is not surprising. There were only 6 high schools in the entire state in 1889. Kindergartens, for example, did not exist in significant numbers, if at all, in 1889; the first kindergarten in Seattle opened in 1914. *See generally*, Mary Jane Honegger, *Washington State Historic Schools Status 2002* at 10, 28 (compiled for the Washington Trust for Historic Preservation). Certainly school programs like bilingual education (RCW 28A.180), special education (RCW 28A.155), learning assistance for underachieving students (RCW 28A.165), highly capable student education (RCW 28A.185), or Running Start (RCW 28A.600.300, *et seq.*), just to name a few, did not exist in 1889.

school system authorized in article IX, § 2. This Court has articulated the broad parameters of what constitutes "a general and uniform system of public schools" under article IX, § 2 in numerous cases,[23] generally eschewing a rigid sense of what constitutes uniformity. *See generally,* Asti Gallina, *The Washington State Constitution and Charter Schools: A General Uniform Prohibition*?, 92 Wash. L. Rev. 371 (2017); Tara Raam, *Charter School Jurisprudence and the Democratic Ideal*, 50 Colum. J. of L. & Soc. Probs. 1 (2016).

This Court has rejected the charter school opponents' rigid position in past decisions. In *Seattle School District* and *McCleary*, this Court rejected the proposition, for example, that the constitutional right to an education under article IX guaranteed each student a uniform educational outcome; rather, students are entitled to equivalent educational opportunities. In *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 219 P.3d 941 (2009), this Court rejected the proposition that exact uniformity of programs and services was constitutionally mandated when it rejected the argument that article IX, § 2 mandated uniform salaries

[23] *E.g.*, *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 502, 99 Pac. 28 (1909) ("every child shall have the same advantages and be subject to the same discipline as every other child."); *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 729, 530 P.2d 176 (1974), *overruled on other grounds*, *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 514, 585 P.2d 71 (1978) (free access to minimal facilities, access to skills and training reasonably understood to be basic to a sound education, and with credits being transferable).

statewide. *Id*. at 526. Similarly, in *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001), the Court differentiated between the public school system and common schools, noting that local school districts were not the only constitutional providers of public education services. That case involved a challenge to a program run by contractor selected by OSPI to provide education services to incarcerated youth. The incarcerated youth sued the State, arguing that only their local school district could serve them. The Court rejected this argument, stating: "Nothing in this provision, however, mandates that the education must be identical." *Id.* at 221-23. The Court also specifically recognized that school districts alone do not supervise education in Washington, stating: "…as we have seen in many instances, the Legislature has found entities other than school districts qualified to educate our youth." *Id.* at 232.

The Legislature must retain authority over the organization of Washington's public school system. Our Constitution requires the Legislature to provide a school system open to all, but nowhere restricts its ability to offer specialized educational programs. Contrary to the position of the charter school opponents in their brief at 26-27, *nothing* in article IX, § 2 bars the Legislature from providing all educational services, or a part of them, in different programmatic settings with different forms of

governance, so long as the constitutional mandate of a "general and uniform" *system* of education is met. Moreover, nothing in that provision dictates that educational services must only be delivered through school districts. In fact, school districts are creatures of the Legislature, as they are *nowhere* even mentioned in the Constitution.

In exercising its plenary article IX, § 2 organizational authority, the Legislature has the power to create educational programs delivered through local school districts, as well as educational programs delivered through charter public schools or in a variety of other settings,[24] subject to the constitutional supervisory role of the Superintendent of Public Instruction. Wash. Const. art. III, § 22.[25]

The Legislature must provide a uniform school system, not uniform schools, as the charter school opponents contend. For this Court to hold otherwise would needlessly call into question the viability of those other programs and "constitutionalize" certain means of delivering

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[24] For example, the community colleges supervise the Running Start program. Other valuable educational programs include the National Guard Youth Challenge Program, the Early Entrance Program or Transition School Program at the University of Washington, education programs for juvenile inmates of the Department of Corrections, education center programs, the Washington Community Learning Center Program and state-tribal education compact programs. *See* CP 3752-53.

[25] That provision states in pertinent part:

> The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law.

educational services, effectively transferring the responsibility for organizing Washington's public schools from the Legislature to the courts. This Court should reaffirm the Legislature's broad article IX, § 2 authority.

F. CONCLUSION

After *LWV*, the Legislature chose to appropriate revenues from an account funded by lottery proceeds to support charter public schools. It was entitled to do this. Simply put, the General Fund is not synonymous with the common school fund. Appropriations from the General Fund or non-General Fund sources (that are not a part of the constitutional common school fund) do not "divert" support for the common schools. This is why the Legislature's decision to support numerous educational programs from various non-common school fund sources is constitutional. The same is true for the support of charter public schools from the OPA.

The Legislature has broad power under article IX, § 2 to organize the delivery of public educational services. Nothing in that constitutional provision restricts the authority of the Legislature to deliver public education, generally or in part, so long as the system is "general and uniform," as this Court has defined those terms. The Legislature has discretion under article IX, § 2 to provide for charter public schools.

DATED this 26 day of October, 2017.

Respectfully submitted,

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APPENDIX

Article IX, § 2:

> The Charter School Act directs the legislature to appropriate certain operational and construction funds to charter schools from the Washington Education Pathways Fund, in an effort to sidestep the Court's ruling in *League of Women Voters*. Charter School Act, §§ 127, 128. The Act, however, does not change the substantive effect of charter schools on restricted basic education funding. The Act specifically states that the "legislature intends that state funding for charter schools be distributed equitably with state funding provided for other public schools." *Id*., § 128(1). The Act did not establish a new revenue source or eliminate any existing expenditures. Instead, as confirmed by the legislative history, the legislature intends merely to move existing moneys and/or existing programs between the general fund and the Washington Education Pathways Fund as needed to continue the diversion of public funds to charter schools. The constitutional defects in I-1240's funding provisions identified by the Court cannot be overcome by this type of shell game. Additionally, as permitted under the Act, certain administrative costs continue to be funded directly from the general fund during fiscal year 2016.

Article IX, § 3:

> Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state when the purpose of the grant is not specified, or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of stone, minerals, or property other than timber and other crops from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating stone, minerals or property other than timber and other crops from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state, which shall be sold by the United States subsequent to the

admission of the state into the Union as approved by section 13 of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been, and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund.

Article VIII, § 4:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

RCW 28B.76.526:

The Washington opportunity pathways account is created in the state treasury. Expenditures from the account may be used only for programs in chapter 28A.710 RCW (charter schools), chapter 28B.12 RCW (state work-study), chapter 28B.50 RCW (opportunity grant), RCW 28B.76.660 (Washington scholars award), RCW 28B.76.670 (Washington award for vocational excellence), chapter 28B.92 RCW (state need grant program), chapter 28B.105 RCW (GET ready for math and science scholarship), chapter 28B.117 RCW (passport to college promise), chapter 28B.118 RCW (college bound scholarship), chapter 28B.119 RCW (Washington promise scholarship), and chapter 43.215 RCW (early childhood education and assistance program).

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Amici Curiae Legislators*** in Supreme Court Cause No. 94269-2 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 2, 2017 at Seattle, Washington.

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